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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 554

BEATRICE MARTENS, *Petitioner,*

vs.

LYMAN G. WINDER, *Respondent.*

Petition for Writ of Certiorari

To the United States Court of Appeals
for the Ninth Circuit

BEATRICE MARTENS
Box 1163
Oakland 4, California
Petitioner in Propria Persona

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In the Supreme Court of the United States

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BEATRICE MARTENS,
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vs.

LYMAN G. WINDER,
Respondent.

Petition for Writ of Certiorari

To the United States Court of Appeals
for the Ninth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Beatrice Martens, the petitioner herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on February 1, 1965.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit (infra, Appendix A, page 1) is reported at 341 F.2d 197.

The Judgment of the United States Court of Appeals is printed in Appendix A hereto, infra, page 8. Memorandum Opinion and Order Dismissing Complaint of the United States Court for the Northern District of California, Southern Division is printed in Appendix A hereto, infra page 9.

JURISDICTION

The Judgment of the United States Court of Appeals was entered on February 1, 1965 (infra Appendix A, page 8). Rehearing was denied on April 12, 1965. The jurisdiction of the court is invoked under 28 U.S.C. #1254 (1). (Order Staying Mandate issued April 21, 1965 granting a stay of 30 days and thereafter pursuant to order of court up to and including July 10, 1965. On July 8, 1965 an Order Extending Time to File Petition for Writ of Certiorari was issued by the Supreme Court of the United States to and including September 9, 1965).

QUESTIONS PRESENTED

1. Has the Circuit Court of Appeals in its Opinion correctly stated local law respecting service on and jurisdiction of non-resident defendants?

2. Has the Circuit Court of Appeals considered Section 417 Code of Civil Procedure in the light of *current California interpretation* of that section by California authorities?

3. Has the Circuit Court of Appeals overlooked *Allan v. Superior Court,* 41 C. 2d 316 and 5 U.C.L.A. Law Review

198 at pages 323 and 233 cited by appellant in her brief on appeal?

4. Has the Circuit Court of Appeals overlooked and failed to apply the rules set forth in its own decision rendered in *L. D. Reeder's Contractors of Arizona v. Higgens Industries,* 265 Fed. Rep. 768?

5. Has the Circuit Court of Appeals correctly stated Federal Law respecting jurisdiction of and service upon residents residing in a foreign country?

6. Has the Circuit Court of Appeals overlooked Rule 4 (i) of the Federal Rules of Civil Procedure in considering that Rule in its Opinion?

7. Has appellant stated a claim upon which relief may be granted?

8. Does the Superior Court of the State of California have prior jurisdiction of the res in this action?

CONSTITUTIONAL PROVISION INVOLVED

A portion of Amendment XIV, Section 1 of the United States Constitution (U.S. Constitution—Amendment XIV, Sec. 1) is involved.

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

California Code of Civil Procedure

Section 412

Section 413

Section 417

Section 1917

Federal Rules of Civil Procedure
Rule 4 (e) as amended in 1963
Rule 4 (f)
Rule 4 (i) 1963

STATEMENT

This is an action for declaratory relief respecting an Agreement made in California concerning California property and for damages and an accounting. The complaint was filed on December 5, 1962 by plaintiff, (Respondent herein) Beatrice Martens, against Lyman G. Winder, defendant (Petitioner herein). Plaintiff is a resident of California and defendant a resident of British Columbia, Canada. The amount in controversy is over $10,000.00.

Defendant, Lyman G. Winder, was personally served with a summons and complaint in the action, together with a copy of the Court's Order for Publication of Summons, on March 8, 1963 at his place of residence in White Rock, British Columbia, Canada. Return of Service was filed in the District Court on March 11, 1963. A registered letter was also mailed to defendant containing the above documents and return receipt thereafter delivered to plaintiff.

The Record

The lower court makes much ado in its Opinion respecting appellant's "difficulty" in framing her complaint to its satisfaction. This is no doubt the reason why material facts have not been accurately stated in the Opinion and why the Court has misconceived her cause of action.

An examination of plaintiff's pleadings in the lower court will show that plaintiff originally set forth her statement of claim in the clear and concise fashion required under Federal Rules. Defendant thereafter *filed* and *refiled* numerous motions to dismiss and motions to make more definite

and certain, etc. Defendant's constant motions and the District Court's insistence that plaintiff set forth her complaint *in the manner desired by defendant*, its insistence that plaintiff state her claim *formally in terms of specific causes of action* (which is not required under Federal Rules) and that plaintiff set forth in her complaint *many unnecessary evidentiary facts*, has made the record unreasonably voluminous and has resulted in great loss of time, expenditures and harassment to plaintiff. In addition plaintiff has been required to answer numerous interrogatories while writing and rewriting her complaints. Under the discovery procedures now in common practice in the courts, such motions are not necessary since facts sought by defendant could have been readily ascertained by deposition and further interrogatories.

Since appellant's action was dismissed by the District Court on a motion appellant's statement of facts must be considered as being true.

> "The motion to dismiss, of course, admits all material facts well pleaded." *Ansehl v. Puritan Pharmaceutical Co.*, 8 Cir., 61 F.2d 131, 133; *Winget v. Rockwood*, 8 Cir., 69 F.2d 326, 329.
>
> "A requirement of successive repleading to force plaintiff against his will to limit his case beyond the issues he has tendered in his complaint is contrary to the basic principles of these rules". *Padovani v. Bruchman*, C.A. N.Y. 1961, 293 F.2d 546.
>
> "The true test of the sufficiency of a statement of claim is whether the pleading gives fair notice and states the elements of the claim plainly and concisely, not whether it states facts or conclusions." *Black v. Board of Education of Amityville*, N.Y. D.C. N.Y. 1962, 31 F.R.D. 14.
>
> "These rules require only that 'claim' and not a 'cause of action' be stated." *Rhodes v. Huston*, D.C. Neb. 1962, 202 F. Supp. 924, affirmed 309 F.2d 659, certiorari denied 83 S.C. CT. 724.

REASONS

1. The Court of Appeals has decided a federal question of substance in a way probably not in accord with applicable decisions of this court.

2. The Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter.

3. The Court of Appeals has rendered a decision in conflict with rules formulated by itself in L. D. Reeder Contractors of Arizona v. Higgens Industries, 265 Fed. Rep. 2d 768 at page 773.

4. The Court of Appeals has decided an important state question in a way in conflict with applicable state law.

5. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Petitioner respectfully shows to the Court that this is a case of great and continuing importance. The Opinion of the Circuit Court of Appeals if permitted to stand will wipe away the great advances made in recent years respecting jurisdiction over out-of-state and foreign defendants, and will result in seriously retarding or nullifying the so called long arm statutes passed in recent years and deaden the impact of International Shoe Company and McGee v. International Insurance Company cases (*International Shoe Company v. Washington*, 326 U.S. 310; *McGee v. International Life Insurance Company*, 355 U.S. at page 222, 78 S. Ct. at page 201). The "rules" distilled from these cases and from the companion case, Hanson v. Dinkla, 357 U.S. 235, 251-52 (1958) were adopted by the Circuit Court of Appeals Ninth Circuit, *the same Court which wrote the Opinion in this case.* In fact the Presiding Justice assisted

in drafting these same "rules" and so stated during the hearing of appellant's appeal in that court. These "rules" are extensively set forth in *L. D. Reeder Contractors of Arizona v. Higgens Industries*, 265 Fed. Rep. 2d Series 768 (9th Cir. 1959) and were cited in Appellant's Briefs filed in the Circuit Court of Appeals writing the Opinion in this action.

An examination of plaintiff's pleadings in this action will unquestionably show that Lyman G. Winder, Respondent herein, *had substantial contact with the State of California.*

The Supreme Court of the United States in 1957 ruled on the facts in *McGee v. International Life Insurance Company*, 355 U.S. 220, Mr. Justice Black noting that there existed a steady trend toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. (Id. 355 U.S. at page 222, 78 S. Ct. at page 201.) On appeal from the refusal of the Texas courts to enforce the California judgment Mr. Justice Black held that it was:

> "sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that state . . ."

The most significant issue involved is whether the District Court had the power to take in personam jurisdiction over a non-resident who was not physically in the state when served with process.

We think it abundantly evident that the due process clause of the Fourteenth Amendment is satisfied by compliance with the test enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945) and more recently in *McGee v. International Life Insurance Co.*, 355 U.S. 220.

The contract here sued on was delivered in California and was made respecting property located in California. It was consummated after respondent had made numerous contacts with that state by way of visits, conferences, etc. with appellant in that state and by way of extensive correspondent after he returned to his home in Canada. It was sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with the state.

> "The activities in question established between the state and the corporation sufficient contacts or ties to make it just, and in conformity to the due process requirements of the Fourteenth Amendment for the State to enforce against the corporation an obligation arising out of such activities." *International Shoe Co. v. State of Washington et al.,* 326 U.S. 310.
>
> "The Due Process Clause of the Fourteenth Amendment did not preclude the California court from entering a judgment binding on respondent, since the suit was based on a contract which had a substantial connection with California." *McGee v. International Life Insurance Co.,* 355 U.S. 220.
>
> "The 'minimum contacts test' utilized in determining jurisdiction over corporations, applies to natural persons as well . . . Correspondence alone may establish sufficient contacts with state to subject non-resident to suit with state on a cause of action arising out of those contacts." *Calagaz v. Calhoun,* 309 F (2d) 248 (1962) (10) and (15).
>
> "The court whose process is first served has the prior jurisdiction." *U.S. v. Certain Parcels of Land* (1945), 62 F. Supp. 1017.
>
> "After a court has obtained jurisdiction of the parties it may, by a decree operating in personam, control actions with respect to property situated outside its jurisdiction whenever such action is necessary to

effect complete disposition of the controversy." *Mills v. Mills,* 147 Cal. App. 2d 107.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

BEATRICE MARTENS
In propria persona

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit
No. 19,544

BEATRICE MARTENS,
Appellant,

vs.

LYMAN G. WINDER,
Appellee.

[February 1, 1965]

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: BARNES, Circuit Judge; MADDEN, Judge, U.S. Court of Claims; KOELSCH, Circuit Judge

BARNES, Circuit Judge:

This is an appeal from a district court order of May 14, 1964, dismissing appellant's fourth amended complaint without leave to amend. Appellant, a California resident, filed the original complaint on December 5, 1962, joining as defendants her sister, Dorothy Smith, a California resident, and her brother, Lyman Winder, a resident of Canada. Appellant subsequently amended her complaint prior to service by deleting Dorothy Smith as a party defendant.

Appellant, appearing *in propria persona,* had great difficulty in framing her complaint to the satisfaction of the

district court. She was permitted to amend her complaint three times until the district court was satisfied that the complaint stated no basis upon which it could exercise jurisdiction. The district court granted the motion to dismiss on the grounds: (1) that it lacked *in personam* jurisdiction over the person of the defendant; (2) that it lacked *in rem* jurisdiction over the property involved; and (3) that appellant had failed to join an indispensable party to the third cause of action.

The complaint stated three causes of action. The first alleged that appellee had breached the confidential and fiduciary relationship with appellant that he had assumed to protect appellant's interests in certain Canadian assets, including real property, in their mother's estate. Appellant alleges that her interests in the realty and personalty of the estate have been converted by appellee. The second cause of action is essentially a reiteration of the first, underscoring the fraudulent misrepresentations allegedly made by appellee. The third cause of action alleges fraudulent misrepresentations and breach of a partition agreement among appellant, appellee and Dorothy Smith concerning *certain California realty* which was the subject of their father's estate. Appellant alleged that appellee made several fraudulent misrepresentations which caused appellant to incur expenses for the prospective sale of the realty; that appellee refused to convey his interests as agreed so that appellant could effect a sale of the realty; and that appellee sought to insulate himself from liability by assigning his interests in the property by a deed of trust to Dorothy Smith.

Appellant's complaint states only one basis upon which federal jurisdiction could be founded, *viz.*, diversity of citizenship as it relates to controversies between citizens of

a state and citizens of foreign states. 28 U.S.C. § 1332. Appellant is a citizen of California; appellee is a citizen of Canada. Diversity of citizenship does unquestionably exist between the two parties. Appellee contends, however, that the district court was nevertheless without jurisdiction to entertain this suit because he was not personally served within the borders of California. Appellant contends that personal service within California was not necessary; and, alternatively, that even should the court find that California service was necessary, appellee has effectively waived his objection by appearing to defend the suit on its merits.

Rule 4 of the Federal Rules of Civil Procedure prescribes certain standards for the proper service of process on defendants to civil litigation. Subdivision (f) of that Rule provides:

> "(f) Territorial Limits of Effective Service . . . All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. . . ."

No statute of the United States exists which provides an exception to the general requirement of service within the state for an action such as appellant's in the present case. Under the 1963 Amendment to Rule 4(e) of the Federal Rules of Civil Procedure, however, an alternative possibility now exists to validate personal service of process on a non-domiciliary beyond the confines of the state in which the district court sits. This rule, as amended, reads in part:

> "(e) . . . Service Upon Party Not Inhabitant of or Found within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in

lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule."

The second sentence of the subdivision, added by the 1963 Amendment, permits resort to state procedures for service on non-resident parties and absent domiciliaries. The Amendment recognized the need for revised procedures in the face of broadening jurisdictional exercises such as non-resident motorist laws and other state "long-arm" statutes. It is necessary, therefore, to examine the California statutes to ascertain if the method of service utilized by appellant was authorized by the State procedural rules.

As noted in the Memorandum Opinion of the district court, Sections 412 and 413 of the California Code of Civil Procedure provide for service by publication upon non-resident defendants as well as service by mail or personal service where the foreign residence is known. In the present case, appellee was served by publication in an Oakland, California legal newspaper, and was also served personally in British Columbia, Canada. Nevertheless, *in personam* jurisdiction was not obtained over appellee because of the restrictions imposed by Section 417 of the California Code of Civil Procedure, which provides as follows:

"Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person *only* if he was personally served with a copy of the summons and complaint, *and* was a resident of this State (a) at the time of the commencement of the action, or (b) at the time that the cause of action arose, or (c) at the time of service." (Emphasis added.)

"Resident" is the equivalent of "domiciliary." *Hartford v. Supreme Court,* 47 Cal.2d 447 (1956).

The record of this case amply demonstrates that at all times relevant under Section 417, appellee was a resident of Canada, not of California.

The appellee not being a resident at any of the three times specified in section 417, said section, therefore, expressly precludes the exercise of jurisdiction within the California courts. Furthermore, as to appellant's third cause of action alleging the commission of the tort of fraudulent misrepresentation with respect to California property, no other statutory provision of California law is cited to us, nor do we find any applying to *non-residents,* which might be deemed capable of conferring jurisdiction, even if the alleged tort is deemed to have been committed within the State of California. The only other bases for the exercise of jurisdiction over *non-resident* defendants committing allegedly tortious acts within California are the non-resident motor vehicle operator statute (Cal. Vehicle Code § 404) and the non-resident airplane operator statute (Cal. Pub. Util. Code § 21414). Neither provision applies in this instance. Thus, although all the requirements of due process would seem to permit California to exercise jurisdiction over a non-resident for *any* tort (including fraudulent mis-

representation) he may commit within the State (see *e.g.*, Ill. Rev. Stat. c. 100, § 17 (1957)), the California legislature has not yet seen fit to enact such a comprehensive statute. We hold, therefore, that the district court properly held that it was without *in personam* jurisdiction over the appellee.

Appellant contends that if in fact appellee's defense of improper service is meritorious, he has nevertheless waived his objection by proceeding to contest the suit by filing motions for more definite statements, motions to dismiss on grounds other than a lack of *in personam* jurisdiction, and by directing interrogatories to the appellant. But such a contention ignores the express language and purpose of Rule 12 of the Federal Rules of Civil Procedure which seeks to consolidate all pre-trial defenses and objections by eliminating the distinction between general and special appearances.

Rule 12(g) expressly provides:

> "(g) Consolidation of Defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule."

Appellee properly joined multiple defenses and objections to each of appellant's complaints. In each such motion, appellee reestablished his contention that appellant lacked jurisdiction over his (appellee's) person. Appellee was compelled to make this objection—and join in his motion all other objections and defenses enunciated in Rule 12—to appellant's original complaint and each amended complaint.

By so doing, appellee did not engage in any dilatory tactics proscribed by Rule 12. He rather strictly adhered to the policy against successive pre-trial motions by consolidating his grounds in a single motion to each complaint. In this way, he followed the expedited procedures of Rule 12 and avoided a waiver of his defenses and objections under Rule 12(h).

We hold, therefore, that appellee has not waived his objections to improper service of process. Consequently, the district court properly concluded that it lacked *in personam* jurisdiction of the defendant-appellee.

We further conclude that no other federal jurisdictional basis exists upon which appellant can maintain her action. No federad *in rem* jurisdictional ground has been demonstrated by appellant, nor have we been able to conceive of one from the allegations raised. Furthermore, those controversies that do exist with respect to the California estate of the parties' father will be resolved by the presently pending action in the California Superior Court in and for the County of Alameda. Likewise, as appellant conceded in oral argument, she can seek (as a minimum) redress in Canada with respect to the properties located there.

In the absence of any basis of federal *in rem* jurisdiction, and with no authority existing under federal or California law for acquiring *in personam* jurisdiction by out-of-state service on an out-of-state resident under any construction of the facts presented in appellant's complaint, we find that the district court properly dismissed appellant's fourth amended complaint without leave to amend.

We find it unnecessary to examine the question of whether or not the third cause of action fails in any event for non-joinder of an indispensable party, Dorothy Smith.

Affirmed.

Judgment

United States Court of Appeals
for the Ninth Circuit

No. 19,544

BEATRICE MARTENS,	*Appellant,*
vs.	
LYMAN G. WINDER,	*Appellee.*

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered February 1, 1965

Filed — May 14 1964
Clerk, U. S. Dist. Court
San Francisco

In the United States District Court for the Northern District of California, Southern Division

Civil No. 41152

Beatrice Martens, *Plaintiff,*

vs.

Lyman J. Winder, *Defendant.*

MEMORANDUM OPINION AND ORDER DISMISSING COMPLAINT

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the defendant moves to dismiss the Fourth Amended Complaint on several grounds. The motion is granted on the following grounds: (1) that the Court lacks *in personam* jurisdiction over the person of the defendant; (2) that the Court lacks *in rem* jurisdiction over property in Canada and California; and (3) that plaintiff has failed to join an indispensable party to the third cause of action.

Plaintiff, a layman acting as her own lawyer throughout these proceedings, filed the original complaint on December 5, 1962. She joined as defendants her sister, Dorothy Smith, a resident of California, and her brother, Lyman Winder, a resident of Canada. Plaintiff subsequently amended her original complaint before service of any papers to name only Lyman Winder as a defendant. Thereafter, the Court permitted plaintiff to amend her complaint three times in

the hope that she would state the nature of her claims with sufficient clarity that the Court could rule on them.[1] With respect to the present complaint, the Court is satisfied, in light of the allegations of the earlier pleadings and the improved clarity of this complaint, that it now understands the nature of plaintiff's claims sufficiently to enter a ruling on the merits of the motion to dismiss.

Jurisdiction is founded solely on diversity of citizenship as it relates to controversies between citizens of a state and citizens of foreign states. 28 U.S.C. 1332. The present complaint states three causes of action. The first is an allegation that defendant by certain representations and promises assumed a confidential and fiduciary relationship with plaintiff to protect plaintiff's interests in the Canadian estate of her mother; that defendant failed to perform his fiduciary obligations; that he converted certain assets of the estate belonging to plaintiff; and that as a result plaintiff never obtained her interest in the realty and personalty which was the subject matter of her mother's estate. The

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1. In its Order Dismissing the Third Amended Complaint, the Court observed that: "Throughout the hearing on this motion, the Court has repeatedly encouraged plaintiff to seek the advice of counsel. Defendant's counsel has represented in open court that his client is indigent, and that counsel is not being compensated. Plaintiff has admitted that she is financially able to employ counsel, but believes that she has better results when she acts in her own behalf. Furthermore, plaintiff has represented to the Court that her son is a member of the New York State Bar and a graduate of Harvard Law School. The Court offered to grant a continuance to allow plaintiff to communicate with her son, so that he could aid her in preparing her papers. Plaintiff has steadfastly refused this offer. Under these circumstances, the Court feels that it should not spend any further time trying to decipher this complaint at the expense of other litigants and the defendant in this case. The Court has studied the record and has attempted to liberally construe the complaint to determine the nature of the claims for relief. The end result of any further efforts by the Court would be nothing more than 'mere speculation', rather than 'liberal construction'."

second cause of action incorporates by reference many of the allegations of the first cause of action and charges fraud. The prayers of the first and second causes of action are for damages, for a declaration of the interests in the Canadian realty and personalty, and for an accounting of the assets of the Canadian estate.

The third cause of action relates to a partition agreement between plaintiff, defendant, and Dorothy Smith for the partition of realty located in California which was the subject matter of their father's estate. Plaintiff alleges that defendant made several fraudulent representations which caused plaintiff to make commitments for the sale of the realty; that defendant has refused to convey his interests so that plaintiff can sell the property, and that defendant assigned his interests in a deed of trust covering the property to Dorothy Smith. The prayer in the third cause of action asks for money damages and a declaration of the various rights of the parties respecting the deed of trust.

In Personam Jurisdiction

Defendant objects that he is not properly before this Court because he was not personally served within the borders of California.

Rule 4(f) of the Federal Rules of Civil Procedure prescribes the territorial limits for service of process of this Court. The Rule provides in part that: "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or *by these rules,* beyond the territorial limits of that state." (Emphasis supplied). No statute of the United States has been brought to the Court's attention which would permit service beyond the limits of California in this case. However, Rule 4(e) provides for service on a non-resident de-

fendant in the manner prescribed by the law of the state in which the district court is held.

The California Code of Civil Procedure, Sections 412[2] and 413[3] provide for service of publication upon a nonresident defendant and direct that if his residence be known

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2. Code of Civil Procedure, Section 412, provides: "Where the person on whom service is to be made resides out of the State; or has departed from the State; or can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons; or is a corporation having no officer or other person upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or corporation from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons."

3. Code of Civil Procedure, Section 413, provides: "The order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served and must be pursuant to Section 6064 of the Government Code, unless the court, in its discretion, shall require, in the order for publication, a longer period of publication and except in proceedings instituted pursuant to the provisions of Chapter 4, Title 3, Part 3, of this code. In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office. Service is complete upon the making of such personal service or at the expiration of the time prescribed by the order for publication, whichever event shall first occur.

As used in this section 'post office' includes mail box, sub-post office, substation and mail chute or other like facility regularly maintained by the Government of the United States."

he be served by mail or personally in the foreign jurisdiction. The record reflects that plaintiff served defendant by publication in the Inter-City Express, an Oakland, California legal newspaper, and that a constable in British Columbia personally served defendant pursuant to an order of this Court. Therefore, service was made in the manner prescribed by the law of California and was proper under Rule 4(e).

Nevertheless, this Court lacks *in personam* jurisdiction by reason of Code of Civil Procedure, Section 417. In a diversity of citizenship case, the federal district court looks to state law to determine if it has *in personam* jurisdiction. *Waltham Precision Instrument Co. v. McDonnell Air Corp.*, 310 F.2d 20, 22-23 (1st Cir. 1962); *Jennings v. McCall Corporation*, 320 F.2d 64, 67-70 (8th Cir. 1963); *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 217 F.Supp. 255, 262-263 (1963); See *L. D. Reeder Contractors of Ariz. v. Higgins Industries*, 265 F.2d 768 (9th Cir. 1959). The State law may be more restrictive in its requirements for *in personam* jurisdiction than the minimal due process requirements. *Perkins v. Benquet Mining Co.*, 342 U.S. 437. Nevertheless, the federal court must refuse to hear the case if the state requirements for *in personam* jurisdiction are not satisfied, unless, of course, the state requirements are less restrictive than the minimal requirements of due process.

California Code of Civil Procedure, Section 417, provides as follows:

> "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State (a) at the time of the commencement of

the action, or (b) at the time that the cause of action arose, or (c) at the time of service."

Under this section the word "resident" means "domiciliary". *Hartford v. Superior Court*, 47 C.2d 447 (1956). The record in this case fails to show that defendant was at any time a domiciliary of California; moreover, the record reflects that he presently resides and makes his home in Canada and did so at the time the action was commenced. Even though defendant was personally served, the Court does not have the power to render a personal judgment against him in all three causes of action because he fails to meet the residence requirements of Section 417. Therefore, insofar as plaintiff seeks damages or specific relief against this defendant, defendant's motion to dismiss for lack of *in personam* jurisdiction must be granted.

The fact that defendant filed motions for a more definite statement, motions to dismiss on grounds other than a lack of *in personam* jurisdiction, and interrogatories directed to the plaintiff does not mean that defendant has "consented" to the Court's jurisdiction or entered a "general appearance". Rule 12(b) provides in part that "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." The major purpose of this provision was to eliminate the distinction between general and special appearances. *Diaz-Montero v. Brownell*, 217 F.2d 737 (9th Cir. 1954). The Rule has been applied in diversity cases. See *Investors Royalty Co. v. Market Trend Survey*, 206 F.2d 108; *Haase v. Amer. Philog. Corp.*, 299 F.2d 666. The purpose of the simplified procedure of the Federal Rules would be defeated if the Court were to apply the more rigid California rule on "general appearances", see Witkin, 1 *California Proce-*

dure, Jurisdiction, §§ 66 et seq., especially in light of Rule 12(h), which provides in part that "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply. . .". Furthermore, defendant may obtain extensions of time or take depositions without waiving the defenses of lack of *in personam* jurisdiction and improper venue. *Blank v. Bitker,* 135 F.2d 962, 965-967 (7th Cir. 1943); *Schenstrom v. Continental Machines, Inc.,* 9 F. R. Serv. 12b.23, Case 3; 2 *Moore's* Federal Practice 2264. The two cases cited by plaintiff, *Campbell v. Murdock,* 90 F.Supp. 297, and *Southern Lands v. Henderson,* 24 F.Supp. 835, have no application to the pleadings presently before the Court, since neither mentions Rule 12(b).

In Rem Jurisdiction.

"Jurisdiction in rem presupposes a situs of the res within the boundaries of the forum state." Ehrenzweig, *Conflict of Laws,* p. 83; see *Hanson v. Denckla,* 357 U.S. 235, 246, 250; *Nelson v. Miller,* (9th Cir.) 201 F.2d 277. Although a federal court may entertain actions *inter partes* against administrators, executors or other claimants in order to establish a claim, the federal courts have developed a judge-made exception to their jurisdiction and refuse to order actual distribution of property within the custody of the state court. 1 Barron & Holtzoff, *Federal Practice & Procedure,* § 51.1. In this case both the realty and the personalty in the first two causes of action are in Canada. Therefore, the Court lacks jurisdiction to determine the interests and title to the Canadian property or to compel an accounting of the assets of the Canadian estate. Furthermore, the Court could not declare plaintiff's rights against defendant *inter partes* in the Canadian estate, since the Court lacks

the power under California Code of Civil Procedure, Section 417, to render a personal judgment against defendant.

Insofar as the California realty is concerned, an action filed on November 29, 1962 is presently pending in the Alameda County Superior Court involving the property in dispute and the parties to this lawsuit, in which it appears that the various issues of title and the rights and duties of the parties will be determined. This lawsuit was filed in December of 1962. In a conflict of federal and state jurisdiction over the *res*, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195. Since Alameda County Superior Court first acquired jurisdiction over this property, this Court is precluded from exercising its jurisdiction.

One possible interpretation of plaintiff's complaint is that she is merely seeking an order compelling defendant Lyman Winder to convey his interests, whatever they may be, or a determination of rights *inter partes* in the Canadian and California properties to plaintiff. A distinction is made, as illustrated by the California case of *Rozan v. Rozan*, 49 C.2d 322, 330 (1957), and in 1 Barron & Holtzoff, *Federal Practice & Procedure*, § 51.1, between a decree determining title to property in another jurisdiction and a decree compelling a conveyance *inter partes* of an interest in property not subject to the Court's jurisdiction. As pointed out by the Court in *Rozan*, a court has the power to make *inter partes* determinations of the rights of parties before it, even though it lacks *in rem* jurisdiction over the property. But, in order to do so, the Court must have jurisdiction *in personam*. Since this Court lacks *in personam* jurisdiction, it could not grant such relief to the plaintiff.

Failure to Join an Indispensable Party.

In light of the ambiguous nature of plaintiff's pleadings, particularly the third cause of action, it is conceivable that she could amend her third cause of action to state a claim raising issues that are different than those involved in the state court litigation. As pointed out in Volume 1A of *Moore's Federal Practice* at page 2502, there is no conflict of jurisdiction if the two lawsuits are not essentially *in rem* requiring control of the *res*. If plaintiff could establish a reason for making such a distinction, defendant's motion to dismiss would still have to be granted as to the third cause of action for failure to join an indispensable party.

The third cause of action involves a deed of trust related to a partition agreement between plaintiff and Dorothy Smith and defendant Lyman Winder. Dorothy Smith is the assignee of all of defendant's rights under the deed of trust, is one of the beneficiaries of the estate which is involved in the California property, and has a joint interest with plaintiff and defendant in the property. Under these circumstances, Dorothy Smith is an indispensable party. 3 *Moore's Federal Practice,* ¶ 19.09, p. 2158 et seq.

Granting plaintiff leave to amend the third cause of action would not cure the defect. The original complaint in this action and the affidavit of Dorothy Smith establish that she is a citizen of California. Since plaintiff is also a citizen of California, citizens of the same state would be on different sides of the lawsuit in violation of the rule of complete diversity of citizenship. *Strawbridge v. Curtis,* 7 U.S. 267 (1806).

In view of the fact that this Court lacks both *in personam* and *in rem* jurisdiction as to all three causes of action; that there is a failure to join an indispensable party in the third cause of action; and that the defects in all three causes of

action could not be cured by further amendment; IT IS THEREFORE ORDERED that the defendant's Motion to Dismiss the Fourth Amended Complaint is hereby granted and that the Fourth Amended Complaint is dismissed without leave to amend.

Dated: May 14, 1964.

ALFONSO J. ZIRPOLI
United States District Judge.